IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROBERT OSBORN, an individual, Appellant, v. MICHAEL GEORGE MATHERN and JANE DOE MATHERN, husband and wife and the marital community composed thereof, Defendants, LARRY D. GREENE and JANE DOE GREENE, husband and wife and the marital community composed thereof; STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS, Respondents.	)	NO. 63232-9-I DIVISION ONE UNPUBLISHED OPINION FILED: April 5, 2010

Leach, J. — Robert Osborn appeals from a judgment in favor of the Department of Corrections (DOC) and Larry Greene. Osborn claims that the trial court erred when it instructed the jury on the duty of a following driver and the fault of a nonparty, refused to limit its emergency instruction, and allowed expert testimony in violation of an order in limine. Because the jury returned a special verdict finding no negligence on the part of DOC, Greene, or the nonparty entity,

Osborn cannot demonstrate any prejudice from the giving of the following driver and nonparty fault instructions. Because Osborn proposed the emergency instruction given and did not provide any instruction limiting it, the court committed no error regarding this instruction. Finally, because Osborn did not timely object to the claimed violations of the order in limine, he waived review of this issue. We affirm.

FACTS

On April 12, 2004, around 9:30 a.m., Michael Mathern, a DOC employee, was driving to the Snohomish County Jail in the far right lane of northbound Interstate 5. He saw two cars directly ahead of him veer sharply to the left to avoid hitting a large tire tread in the roadway. Mathern decided to remove it. He pulled off the freeway onto the shoulder, parked his car next to the guardrail about two and one-half feet in front of the tread, and waited for a break in the traffic.

Greene approached in the same lane moments later and saw the tire tread. Gradually slowing his car, he attempted to change lanes but was unable to do so. Greene then saw Mathern waving to him from the side of the road, indicating that he intended to remove the tread. Greene slowed his car to a stop, aligning it with the rear of Mathern's car.

Osborn soon approached the location of the stopped cars at a speed of 55 miles per hour driving an empty dump truck with a trailer attachment. He

described two different versions of events leading up to the accident. At his deposition, Osborn stated that he was following a box van from a distance of about 75 to 100 feet. He first saw the stopped cars about 350 to 400 feet away when the box van and the two cars in front of it changed lanes in a "split second."[1] Immediately, Osborn applied the brakes. At trial, Osborn testified that he was about 160 to 240 feet behind the box van. When the box van and the two cars ahead of it changed lanes to reveal the stopped cars about 350 to 400 feet away, Osborn looked in his mirror to see if he could change lanes and then applied the brakes.

Realizing that a collision was inevitable, Osborn steered his truck to the right, crashing into both cars. Osborn's left wrist was caught in the steering wheel and severely fractured.[2]

On July 7, 2005, Osborn filed suit against Mathern, DOC, and Greene, alleging that Mathern and Greene had caused the collision by negligently stopping their cars on the freeway. Mathern was dismissed from the suit before trial.

At the commencement of trial, Osborn moved in limine to exclude speculative expert testimony regarding Osborn's following distance. The court granted the motion.

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[1] Mathern testified that he first saw Osborn's truck about 300 to 400 feet away. Greene never saw Osborn's approaching truck.

[2] Mathern escaped injury by leaping over the guardrail.

At trial, Osborn called several witnesses, including Mathern and Greene, to establish the facts concerning the accident as described above. Osborn also called Charles Lewis to reconstruct the accident. Lewis focused on the following portion of Osborn's testimony regarding the lane change made by the box van and the two cars ahead of it: "There was a gap in the traffic that I recall now. That's why I thought maybe I could get over because there was a gap. They took all the gap and then there was nothing beside me. All the gap was gone so I was stuck over here." From this testimony, Lewis assumed that Osborn had taken one to two seconds to look in his mirror before applying the brakes. Based on this assumption, Lewis estimated that Osborn, traveling at 55 miles per hour, would have required a distance of 466 feet to stop. In light of Osborn's testimony that he was 350 to 400 feet from the stopped cars when he first saw them, Lewis concluded that Osborn could not have avoided the collision. But Lewis admitted that if Osborn had not spent one to two seconds looking to change lanes before braking, the stopping distance would have been 306 feet.

Greene did not call any witnesses, and DOC called only one witness, Timothy Moebs, to reconstruct the collision. Moebs focused on Osborn's statement that, when he first saw Greene's stopped car, he applied the brakes "[a]s soon as I saw it." From this testimony, Moebs estimated that Osborn, traveling at 55 miles per hour, would have needed a stopping distance of 305 feet. Since Osborn testified that he was 350 to 400 feet from the stopped cars

when he first saw them, Moebs concluded that Osborn could have stopped in time to avoid the collision. Moebs noted that Osborn's trial testimony, which placed him further behind the box van, allowed Osborn an even greater stopping distance. Moebs also pointed out that Osborn could have braked and then looked to change lanes. During Moebs's testimony, Osborn did not raise any objection.

Before closing argument, the parties discussed jury instructions. Osborn objected to the instructions concerning the fault of a nonparty and the duty of a following driver and requested a limitation on the emergency instruction. The court allowed the nonparty at fault and following driver instructions and did not limit the emergency instruction.

The jury returned a special verdict, finding no negligence on the part of DOC, Greene, or the nonparty entity. Osborn appeals from the judgment dismissing his complaint.

ANALYSIS

Osborn first challenges the trial court's decision to give instruction 12, which describes the duty of a following driver:

> A statute provides that a driver shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the vehicles and the traffic upon and the condition of the street or highway.
>
> When one vehicle is following another vehicle, the primary duty of avoiding a collision rests upon the driver of the following vehicle. It may be considered evidence of negligence if the following vehicle collides with the vehicle ahead, in the absence of

> an emergency. The driver of the following vehicle is not necessarily excused even in the event of an emergency. It is the duty of the driver of the following vehicle to keep such distance and maintain such observation of the vehicle ahead that the following vehicle is able to safely stop if confronted by an emergency that is reasonably foreseeable from traffic conditions.[3]

Generally, we review a trial court's decision on whether to give an instruction for an abuse of discretion.[4] But a trial court's decision to give an instruction based on a ruling of law is reviewed de novo.[5] A trial court is required to submit instructions to a jury on a theory of the case only where substantial evidence supports the theory.[6] The supporting facts for a theory and instruction, however, must consist of more than speculation and conjecture.[7] Trial court error regarding jury instructions does not require reversal unless prejudice is shown.[8] An error is not prejudicial unless it presumptively affects the outcome of the trial.[9]

Osborn contends that the following driver instruction does not apply here because he was not "following" Greene. But we need not address whether giving this instruction was error because Osborn cannot show that it was

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[3] Osborn does not cite instruction 19, which reads, "Defendants claim as an affirmative defense that Plaintiff was contributorily negligent in following too close and failing to keep a proper look out. Defendants claim that Plaintiff's conduct was a proximate cause of Plaintiff's own injuries and damage."

[4] Tuttle v. Allstate Ins. Co., 134 Wn. App. 120, 131, 138 P.3d 1107 (2006).

[5] Tuttle, 134 Wn. App. at 131.

[6] Cooper's Mobile Homes, Inc. v. Simmons, 94 Wn.2d 321, 327, 617 P.2d 415 (1980).

[7] Bd. of Regents of Univ. of Wash. v. Frederick & Nelson, 90 Wn.2d 82, 86, 579 P.2d 346 (1978).

[8] Boeing Co. v. Key, 101 Wn. App. 629, 633, 5 P.3d 16 (2000).

[9] Key, 101 Wn. App. at 633.

prejudicial.

Case law supports this result. For example, in Bertsch v. Brewer,[10] the plaintiff appealed a jury verdict for the defendant in a medical malpractice case, alleging that the trial court erred in giving a contributory negligence instruction. In affirming the trial court, our Supreme Court found any error harmless, reasoning,

> The jury found no negligence on Brewer's part and, therefore, never reached the issue of Bertsch's contributory negligence. The instruction and special verdict form used clearly informed the jury that the issue of contributory negligence was not to be considered until an initial conclusion as to Brewer's negligence had been made. Because the jury found no negligence on Brewer's part, they presumably never reached the issue of Bertsch's contributory negligence.[11]

Similarly, in Ford v. Chaplin,[12] the jury returned a verdict for the defendant in a medical malpractice case, and the plaintiff assigned error to the giving of the contributory negligence instruction. This court relied on the Bertsch court's reasoning in finding any error harmless.[13] The Ford court specifically pointed out that the special verdict form set forth four questions for the jury to consider.[14] The first question asked if the defendants were negligent.[15] The verdict form stated that if the answer to this question was "no," then the jury should not consider the next three questions relating to damages, negligence of the

[10] 97 Wn.2d 83, 91-92, 640 P.2d 711 (1982).
[11] Bertsch, 97 Wn.2d at 92.
[12] 61 Wn. App. 896, 901, 812 P.2d 532 (1991).
[13] Ford, 61 Wn. App. at 901.
[14] Ford, 61 Wn. App. at 901.
[15] Ford, 61 Wn. App. at 901.

plaintiff, and percentage of contributory negligence.[16] Noting that the jury's response to the first question was "no," the Ford court concluded that "the jury here never needed to reach the issue of contributory negligence and hence any error would be harmless."[17]

Here, the special verdict form set forth seven questions for the jury to consider. The first question asked if Greene, DOC, or a nonparty entity was negligent. The form instructed the jury that if the answer to this question as to each defendant was "no," it should then sign and return the verdict form. As in Bertsch and Ford, the jury here answered "no" to the first question, so it never reached a latter question addressing contributory negligence. Thus, Osborn cannot show that he was prejudiced by the following driver instruction.

Osborn also challenges the court's decision to give instructions 19 and 25 regarding the fault of a nonparty entity.[18] Instruction 19 states, in part, "Defendants claim that a non-party entity was negligent in leaving tire debris on the freeway and that such conduct was a proximate cause of Plaintiff's injuries and damage." And instruction 25 provides,

> Before a percentage of negligence may be attributed to any entity that is not [a] party to this action, the defendant has the burden of proving each of the following propositions: First, that the entity was negligent; and
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> Second, that the entity's negligence was a proximate cause

[16] Ford, 61 Wn. App. at 901.

[17] Ford, 61 Wn. App. at 897, 901.

[18] Osborn does not cite instruction 13, which reads, "A statute provides that any person who drops any material upon any highway shall immediately remove the same or cause it to be removed."

of the injury and/or damage to the plaintiff.

Osborn argues that these instructions should not have been given to the jury because the court incorrectly read RCW 46.61.645. This provision states, in relevant part, "Any person who drops, or permits to be dropped or thrown, upon any highway any material shall immediately remove the same or cause it to be removed."[19] Focusing on the word "thrown," Osborn claims that the statute "contemplates scienter on the part of the actor before a violation will be found" and that the trial court erred when it read the statute as imposing an absolute duty and so instructed the jury.

Again, we need not address whether the giving of these instructions was error because Osborn can show no prejudice. Osborn asserts that the instructions resulted in prejudice since the instructions "served to confuse the issues and allow the jury to come to the absurd result that it did—that neither Greene (who stopped on the freeway) nor Mathern (who blocked the escape route and flagged down Greene's vehicle) were [sic] negligent at all." But this reflects only speculation by Osborn. Instead, the fact that the jury returned a special verdict finding no negligence on the part of DOC, Greene, or the nonparty entity establishes that any error in giving the nonparty at fault instructions could not have affected the outcome of the trial.

Next, Osborn challenges the court's refusal to limit the emergency instruction. DOC responds that Osborn failed to adequately take exception to

[19] RCW 46.61.645(1).

the instruction and to propose an appropriate one.

"If a party is not satisfied with an instruction, it has a duty to propose an appropriate instruction."[20] If the court declines to give the proposed instruction, the party must take exception to that failure.[21] CR 51(f) requires that exceptions to instructions be sufficiently specific:

> Before instructing the jury, the court shall supply counsel with copies of its proposed instructions which shall be numbered. Counsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction. The objector shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made.

The purpose of CR 51(f) is to "assure that the trial court is sufficiently apprised of any alleged error in the instructions so that the court is afforded an opportunity to correct any mistakes before they are made and thus avoid the inefficiencies of a new trial."[22] "'The pertinent inquiry on review is whether the exception was sufficient to apprise the trial judge of the nature and substance of the objection.'"[23] "'[U]nder some circumstances compliance with the purpose of

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[20] Goehle v. Fred Hutchinson Cancer Research Ctr., 100 Wn. App. 609, 614, 1 P.3d 579 (2000); see Roumel v. Fude, 62 Wn.2d 397, 400-01, 383 P.2d 283 (1963).

[21] Goehle, 100 Wn. App. at 614.

[22] Goehle, 100 Wn. App. at 615 (citing Queen City Farms, Inc. v. Cent. Nat'l Ins. Co., 126 Wn.2d 50, 63, 882 P.2d 703 (1994); Van Hout v. Celotex Corp., 121 Wn.2d 697, 703, 853 P.2d 908 (1993)).

[23] Goehle, 100 Wn. App. at 615 (quoting Walker v. State, 121 Wn.2d 214, 217, 848 P.2d 721 (1993)).

the rule will excuse technical noncompliance.'"[24]

Here, the emergency instruction read,

> A person who is suddenly confronted by an emergency through no negligence of his or her own and who is compelled to decide instantly how to avoid injury and who makes such a choice as a reasonably careful person placed in such a position might make, is not negligent even though it is not the wisest choice.

This instruction was proposed by Osborn and accepted by the court. Osborn claims he took exception to the emergency instruction with the following:

> I believe that there has been talk of an emergency for Mr. Mathern . . . . I want to argue that Mr. Mathern does not get the benefit of that when you read what the definition of emergency is. I would ask that that also be included in the packet.

This statement suggests that Osborn objected to the emergency instruction because it did not expressly limit its application to him only and that Osborn was asking the court to draft some modification to his own proposed instruction to limit its application. Notably, none of Osborn's proposed instructions contain any limiting language whatsoever, as his other proposed instruction states, "An emergency requires a person to make an immediate or instinctive choice between alternative courses of action without time for reflection." And Osborn offers no reason, either in briefing or at oral argument, why he should be excused from complying with the requirement that he provide the court with an appropriate instruction.[25] Thus, his failure to propose an appropriate instruction

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[24] Goehle, 100 Wn. App. at 615 (alteration in original) (quoting Queen City Farms, 126 Wn.2d at 63).

[25] Goehle, 100 Wn. App. at 615-16 (rejecting appellant's contention that "the trial court's rush to finish the case" prevented her from pointing out

precludes his challenge to the emergency instruction.[26]

Finally, Osborn argues that reversal is warranted because DOC violated the court's order in limine. Osborn moved in limine to exclude "[a]ny opinions, reports, or testimony offered by defendants' expert, Mr. Moebs, which refer or relate to plaintiff Osborn's following distance . . . as improper expert opinion lacking the requisite foundation." The court granted the motion.

Osborn specifically argues that Moebs violated the order in limine in testifying about the spacing of the vehicles in front of Osborn's truck as he approached the stopped cars.[27] DOC responds that Osborn waived review of this issue by failing to timely object to Moebs's testimony. DOC is correct.

The decision to admit expert testimony is within the trial court's discretion.[28] We will not reverse unless the court abuses that discretion, which occurs when it acts on unreasonable or untenable grounds.[29] "In a situation where a party prevails on a motion in limine and thereafter suspects a violation of that ruling, the party has a duty to bring the violation to the attention of the court and allow the court to decide what remedy, if any, to direct."[30] "A standing

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instructional error because appellant did not cite to anything in the record as support).

[26] See Roumel, 62 Wn.2d at 400 ("We have frequently pointed out that error cannot be predicated on the giving of an instruction which correctly states the law but does not embody a given qualification or exception, if no instruction stating the qualification or exception was requested by the complaining party.").

[27] Moebs assumed the vehicles were 81 feet apart.

[28] In re Det. of Anderson, 134 Wn. App. 309, 318, 139 P.3d 396 (2006), aff'd, 166 Wn.2d 543, 211 P.3d 994 (2009).

[29] Anderson, 134 Wn. App. at 318.

[30] A.C. v. Bellingham Sch. Dist., 125 Wn. App. 511, 525, 105 P.3d 400

objection to evidence in violation of a motion in limine, preserving the issue for appeal, is allowed only to the party losing the motion."[31]

Here, Osborn received a favorable ruling on his motion in limine. Even if we assume that Moebs's testimony were improper, the record shows that Osborn did not raise any objection or request a curative instruction. Thus, he waived review of this issue.

CONCLUSION

Because the jury returned a special verdict finding that DOC, Greene, and the nonparty entity were not negligent, Osborn can show no prejudice from the following driver or nonparty fault instructions. The court did not err in refusing to limit the emergency instruction because Osborn failed to provide an appropriate instruction. Finally, Osborn's failure to timely object to the claimed violations of the order in limine constitutes waiver. Affirmed.

Leach, J.

WE CONCUR:

Dwyer, A.C.J.

Schindler, C.J.

(2004).

[31] A.C., 125 Wn. App. at 525.